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Failure to refer for a preliminary ruling in the European judicial area. Gaps in interpretation and lack of protection for individuals

Georgios Anastasopoulos

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Georgios Anastasopoulos, PhD. Researcher at the CEIJ-New York. Lawyer and Council in EU Commission.

Abstract: The preliminary reference as an appeal to the Court of Justice of the European Union has been a subject of discussion for many years, especially from an interpretative point of view. An appeal that maintains its main function of a complex mechanism since it seeks to ensure a uniform application of European Union law. It is a tool that represents the main basis for settling disputes between internal jurisdictions and for assessing compatibility with EU law, especially in the field of national procedural rules. In the jurisprudential history of the Court, the objectives of the referral do not always have a significant impact on individuals. Above all in the perspective of both the law of the European Union and in the system of the European Court of Human Rights, only the compensatory

protection is recognized in the case of omission of the mandatory referral. The insurance for a concrete, complete and effective protection of individual rights still remains uncertain at the moment of the ascertained violation but questionable in terms of time given that it is sought on an internal procedural level.

Keywords: European Union law; CJEU; ECtHR; failure to refer for a preliminary ruling; independence of judges; procedural preclusions; multi-level protection of individuals; effective domestic remedies.

Introduction

Art. 267 TFEU allows the Court of Justice of the European Union (CJEU) to examine by way of a preliminary ruling questions concerning Union law which have to do with a case brought before "a judicial body of one of the Member States"[1]. The use of "courts" instead of "jurisdictions" (Sadl, 2021; Broberg, Fenger, 2022)[2], with related modifications allow a preliminary ruling procedure, which constitutes a mechanism of

1CJEU, C-241/15, Bob-Dogi of 1st June 2016, ECLI:EU:C:2015:385, not published; C-60/12, Balàž of 14 November 2013, ECLI:EU:C:2013:733; C-396/11, Radu of 29 January 2013, ECLI:EU:C:2013:39, above the cases published in the electronic reports of the cases.

2CJEU, C-210/18, WESTbahn Management II of 10 July 2019, ECLI:EU:C:2019:586, published in the electronic reports of the cases. C-462/19, Anesco and others of 16 September 2020, ECLI:EU:C:2020:715, not yet published. C-487/19, *W.Ż. (and des affaires publiques de la Cour suprême-nomination*) of 6 October 2021, ECLI:EU:C:2021:798, not yet published.

cooperation between domestic judges of the Member States and the CJEU to fulfill the function of administration of justice in the law of the Union and additionally to guarantee the interpretation and the uniform application of it within all the state systems (Rodriguez Medal, 2015)[3].

Art. 267 TFEU (Blanke, Mangiamelli, 2021; Kellerbauer, Klamert, Tomkin, 2024) is broader and more concrete. Especially, it allows a distinction from the other competences attributed by the treaties to the CJEU, thus being understood as a jurisdictional institution that is inclusive within the ambit of the CJEU in the strict sense of the General Court and of specialized courts according to Art. 19 TEU[4].

Those that remain are direct, full and of exclusive powers. Obviously, the subjects entitled to activate them propose their questions directly to the CJEU, which is actually the body that will judge in a complete and exclusive way. According to the preliminary ruling jurisdiction, the CJEU determines questions of EU law thanks to a referral made by a national judge in the context of a judgment that has begun and is destined to end up before the same national judge. In this case, the CJEU pronounces itself on certain questions because:

"(...) it deems a decision on this point necessary to issue its sentence" (art.

3CJEU, C-16/65, Schwarze of 1st December 1965, ECLI:EU:C:1965:117, I-01081.

4CJEU, C-327/18 PPU, R O of 7 August 2018, ECLI:EU:C:2018:644, published in the electronic reports of the cases.

267, lett. 2, TFEU)[5].

The judgment of the CJEU in this case has a preliminary nature in a temporal and non-definitive sense because it precedes the judgment of the national judge in a functional sense and is instrumental given that it respects the enactment of this judgment.

One can speak of an indirect competence given that the initiative to address the CJEU is not taken by the interested parties but by the national judge. It is also a limited competence, which allows the CJEU to examine questions of Union law originating from the national judge. It remains competent to rule on all other aspects of Union law concerning "the questions", where the national judge has not decided to request the CJEU to rule. But is it an exclusive competence?

The competence of Art. 267 TFEU is exclusive in nature given that the CJEU can give preliminary rulings on matters relating to EU law. We cannot speak of absolute exclusivity, when these questions can be ruled primarily by the national courts themselves and when they choose not to address the CJEU. Even in cases of mandatory referral, the mandatory nature of the referral is not absolute given that there are hypotheses in which the national court can decide on its own. The national judge has direct exclusivity of the facts relating to a case as well as of the arguments of the parties involved. He assumes the responsibility

5CJEU, C-310/18 PPU, Miller of 19 September 2018, ECLI:EU:C:2018:732, published in the electronic reports of the cases.

for issuing the ruling according to the best condition for assessing the case. He is also pertinent of the questions of law, which are raised by the dispute of which he is invested as well as the relative need for a preliminary ruling in order to be able to issue the sentence (Lenaerts, Maselis, Gutman, 2014)[6].

There remains an open presumption of relevance of the questions that are referred for a preliminary ruling by the national courts which can be excluded only in exceptional cases and in case the interpretation of the provisions of EU law has no relationship with reality, rectius with the subject of the main proceedings and/or when the problem is of a hypothetical nature or the CJEU does not have the factual and legal elements necessary to usefully resolve the questions submitted to it.

In this case it is up to the national court to decide on the basis of procedural economy and usefulness as a phase of the procedure submitted to the CJEU (Limbach, 2015; Storey, Pimor, 2018)[7] and as a preliminary question, where the CJEU did not detect the relative appropriateness of making the referral at the time in which were defined the questions of fact and of law so as to be able to obtain a better evaluation and to allow this procedure to

6CJEU, C-338/85, Pardini of 21 April 1988, ECLI:EU:C:1988:194, I-02041; C-369/89, Piagene/Peeters of 18 June 1991, ECLI:EU:C:1991:256, I-02971. C-368/89, Crispoltoni of 11 July 1991, ECLI:EU:C:1991:307, I-03695. C-186/90, Durighellio of 28 November 1991, ECLI:EU:C:1991:453, I-05773. C-127/92, Enderby of 27 October 1993, ECLI:EU:C:1993:859, I-05535. C-30/93, AC-Atel Electronics of 2 June 1994, ECLI:EU:C:1994:224, I-02305.

7CJEU, C-72/83, Campus Oil of 10 July 1984, ECLI:EU:C:1984:256, I-02727. C-348/89, Mecanarte-Metalurgica da Lagoa of 27 June 1991, ECLI:EU:C:1991:278, I-03277.

exert its effects to the maximum.

It is confirmed the insistence of a hierarchical relationship between the CJEU and the national judges with the exception for the obligation of the national judges to comply with the decisions of the CJEU. It is not up to the CJEU to rule on the relative jurisdiction of the national judge and/or on the admissibility of the action brought before him nor to ascertain whether the relative measure has been adopted in accordance with the organizational and procedural rules of national law.

Multilevel protection of individuals and failure to refer for a preliminary ruling

Within this context of jurisdictional protection and functioning of the reference for a preliminary ruling, it is obvious that the CJEU must comply with the reference order, which is issued by the national judge, until this has been annulled by an appeal contemplated by domestic law[8].

This happen in the event that it is not up to the CJEU to intervene in the solution of the problems of jurisdiction that arise in the internal legal system by defining certain legal situations that are based on Union law and there are interests indicated to the internal judge and elements that contribute to the solution of the competence problem that he must solve[9].

8CJEU, C-19/68, De Cicco of 19 December 1968, ECLI:EU:C:1968:56, I-00689. C-65/81, Reina of 14 January 1982, ECLI:EU:C:1982:6, I-00033.

9CJEU, C-179/84, Bozzetti/Invernizzi of 9 July 1985, ECLI:EU:C:1985:306, I-

The jurisprudence, in this regard, has stated:

"(...) the power that the CJEU has reserved to control the preliminary ruling procedure not only against abusive deviations but also by verifying the existence of the conditions for its ruling in order to safeguard its effectiveness beyond the division of competences established in principle by building the cooperation relationship between national courts and the CJEU in a vertical way in some respects rather than on the equal character that the article and the meaning of the cooperation itself seem to require (…)" (Storey, Pimor, 2018).

The purpose of Art. 267 TFEU is twofold (Liakopoulos, 2019a). In fact, it seeks to prevent each national judge from interpreting and verifying the validity of EU rules independently. This means that, we are dealing with rules belonging to the legal system of one's own Member State and with the risk of unitary infringement of the nature of EU law. EU law aims to offer national judges a collaboration tool that overcomes the interpretative difficulties raised by EU law since it is a system with its own characteristics and purposes. The reference for a preliminary ruling is not aimed at prohibiting divergences in the sector of interpretation of EU law when the national courts must apply but also and above all

"guaranteeing this application by offering the judge the means to overcome the difficulties which may arise from the imperative to confer to Union law having full effect within the legal systems of the Member States (...)"[10].

As a guarantee of the correct application and uniformity of interpretation of EU law, (Türk, 2010; Wierzbowski, Gubrynowicz, 2015; Hartkamp, Siburgh, Devroe, 2017; Woods,

02301.

10CJEU, C-166/73, Rheinmühlen Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide ubd Futtermittel of 16 January 1974, ECLI:EU:C:1974:3, I-00033.

Watson, 2017)[11] the jurisdiction to give a preliminary ruling makes an important contribution to the development of that law. It suffices to think of the fundamental principles as:

"the direct effect of the provisions of the treaties (Berry, Homewood, Bogusz, 2013; Conway, 2015; Nicola, Davies, 2017; Barnard, Peers, 2017; Usherwood, Pinder, 2018)[12]; the direct effect of directives (Da Cruz Vilaça, 2014)[13]; primacy over incompatible internal regulations[14]; the liability of the Member States for damages resulting from violations of Union law (Geiger, Khan, Kotzur, 2016)[15] have all found their affirmation and their progressive development in rulings made by the CJEU pursuant to Art. 267 TFEU" (Liakopoulos, 2019b).

According to art. 267 which personally involved the national judges and the people that these judges address in a direct way to check that Union law is correctly interpreted and applied by the Member States and within them, multiplying the opportunities in which such control can take place (Folsom, 2017)[16].

11CJEU, C-283/81, CILFIT v. Ministry of Health of 6 October 1982, ECLI:EU:C:1982:335, I-03415.

12CJEU, C-26/62, Van Gend & Loos v. Dutch Tax Administration of 5 February 1963, ECLI:EU:C:1963:1, I-00003. C-56/65, Technique Minière of 30 June 1966, ECLI:EU:C:1966:38, I-00337. C-43/71, Politi of 14 December 1971, ECLI:EU:C:1971:122, I-01039. joined cases C-162 and 258/85, Pugnaloni of 12 June 1986, ECLI:EU:C:1986:246, I-01885. C-267/86, Van Eicke/ASPA of 21 September 1988, ECLI:EU:C:1988:427, I-04769.

13CJEU, C-41/74, Van Duyn v. Home Office of 14 December 1974, ECLI:EU:C:1974:133, I-01337.

14CJEU, C-6/64, Costa v. Enel of 15 July 1964, ECLI:EU:C:1964:64, I-01141. C-106/77, Finance Administration v. Simmenthal of 9 March 1978, ECLI:EU:C:1978:49, I-00629. C-213/89, The Queen v. Secretary of state for transport ex Factortame Ltd and others of 19 June 1990, ECLI:EU:C:1990:257, I-02433.

15CJEU, joined cases C-6/90 and C-9/90, Francovich and Bonifaci of 19 November 1991, ECLI:EU:C:1991:428, I-05357.

16CJEU, C-26/62, Van Gend & Loos v. Dutch Tax Administration, 5 February 1963, op. cit.

The harshness with which the CJEU takes a position against any national provision that hinders or limits the ability of judges to make a referral is pursuant to Art. 267 TFEU (Ambos, 2018; Wouters, Ryngaert, Ruys, 2018)[17].

According to Art. 256, par. 3, paragraph 1 TFEU,

"(…) the court is competent to hear preliminary questions, submitted pursuant to Art. 267 TFEU in specific matters determined by the statute"[18].

The preliminary ruling jurisdiction of the court is not directly provided for by the TFEU but reference is made to a subsequent amendment of the statute of the CJEU which defines the "specific matters" for which the jurisdiction itself should apply. No changes in this sense have occurred at the moment in which the reference for a preliminary ruling remains purely virtual. Contrary to the main competences of the Court (art. 256, paragraph 1 TFEU) (Blanke, Mangiamelli, 2021), the reference for a preliminary ruling can attribute to the court a competence of first and last instance despite the fact that it is not foreseen that the preliminary rulings of the court can normally be challenged before the CJEU.

The same court may refer the case back to the CJEU:

"if it considers that the case requires a decision of principle which could jeopardize the unity or coherence of Union law" (Article 256, paragraph 3,

17CJEU, C-670/16, Mengesteab of 26 July 2017, ECLI:EU:C.2017:587. C-367/16, Piotrowski of 23 January 2018, ECLI:EU:C:2018:27. C-640/15, Vilkas of 24 February 2017, ECLI:EU:C:2017:37. C-579/15, Popławski of 29 June 2017, ECLI:EU:C:2017:503. C-289/15, Grundza of 11 January 2017, ECLI:EU:C:2017:4, all cited cases published in the electronic reports of the cases.

18CJEU, C-636/16, Lòpez Pasturzano of 7 December 2017, ECLI:EU:C:2017:949, published in the electronic reports of the cases.

subparagraph 3) (Türk, 2010; Lenarts, Maselis, Hutman, 2014; Wierzbowski, Gubrynowicz, 2015; Barnard, Peers, 2017; Wouds, Watson, 2017).

In reality art. 256, par. 3 provides for two safeguard clauses. In fact, the court considers that:

"(…) the case requires a decision of principle which could jeopardize the unity or coherence of EU law, it could refer the case back to the CJEU for a ruling (…)[19].

Court decisions on questions referred to a preliminary ruling that could exceptionally be subject to review by the CJEU in the event of serious risks to the unity or coherence of EU law

"(…) the conditions and limits of such review are determined by the statute. Art. 62 of the new CJEU statute entrusts the Advocate General with the initiative to propose the review within one month of the court ruling. The proposal will be subject to preliminary deliberation by the CJEU as to whether or not to proceed with the review. For both provisions, the devolution of part of the prejudicial jurisdiction has not yet taken place (…). The division of powers between the CJEU and the court in the matter of preliminary references is referred to in Art. 19, par. 2 of the TEU (…)" (Usherwood, Pinder, 2018; Pech, 2022)[20].

As can be understood:

"(...) the omission of national judges to submit a preliminary ruling against those decisions (Pertek, 2021) may constitute a violation of the obligations deriving from participation in the Union, specifically those pursuant to Art. 267 TFEU, if the conditions for exemption are not met (...) may lead to the initiation of proceedings for failure of the state, by act of the judge, before the Court of Luxembourg (…)" (Turno, 2019)[21].

19CJEU, C-636/16, Lòpez Pasturzano of 7 December 2017, ECLI:EU:C:2017:949, op. cit.

20CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi SpA v. Italian Railway Network SpA of 6 October 2021, ECLI:EU:C:2021:799, not yet published, par. 27. C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, ECLI:EU:C:2022:99, not yet published, par. 73. C-380/23, Monmorieux of 13 July 2023, ECLI:EU:C:2023:500, published in the electronic reports of the cases. C-318/24 PP, Breian of 29 July 2024, ECLI:EU:C:2024:659, published in the electronic reports of the cases. C-202/24, Alchaster of 29 July 2024, ECLI:EU:C:2024:649, published in the electronic reports of the cases. C-15/24, Stachev of 14 May 2024, ECLI:EU:C:2024:399, published in the electronic reports of the cases.

21CJEU, C-416/17, Commission v. France (advance payment) of 4 October 2018,

The omissive behavior of the judge of last instance:

"(...) is accompanied by a violation of EU legislation, the state may also incur non-contractual liability. In this case, the individual can ask the national judge for compensation for the damages suffered, demonstrating the existence of the conditions elaborated by the Court of Justice in the matter of the offense (...)"[22].

In addition to the failure of the national court of last instance, we can say that it is an object of an action for compensation for damages before the Strasbourg Court obviously based on the jurisprudence of the non-referral and it is configured as a violation of the right to a fair trial according to Art. 6 of the European Convention of Human Rights (ECHR).

The protection of individual rights recognizes an economic aspect to the parties involved but does not provide specific remedies to resolve the substantial illegitimacy, which are actually contained in the decision of the national judge of last instance and not in the CJEU which did not address it.

The lack of remedies requires a certain integration with the national systems according to the purposes of the implementation and execution of the European legislation as

ECLI:EU:C:2018:811, published in the electronic reports of the cases, concerning the omission of the referral by the Conseil d'État.

22According to the conclusions of the Advocate General Bobek of 5 February 2019 in case: C-676/17, Călin of 11 December 2019, ECLI:EU:C:2019:94, published in the electronic reports of the cases, para. 107 and 108-109: "(…) the context of state liability proceedings, there is no doubt that the condition, according to which the judge who allegedly infringed EU law must be the one called to rule in the final instance, is fully justified when the alleged breach of EU law consists in a breach of the obligation to make a request for a preliminary ruling (…) the national judge, by arriving at a particular interpretation of EU law while failing to make a preliminary reference to the Court while being a judge of last instance, he has committed a (sufficiently qualified) violation of EU law (…)".

well as the protection of the rights deriving from it according to Art. 4 TEU regarding the principle of sincere cooperation[23].

Since we are talking about multilevel protection, we must say that the preliminary reference does not allow for a legal remedy by the parties in a dispute before a national judge[24], but for a protection of their legal position with compensatory remedies constituting the prerequisite according to the obligation to postponement of Art. 267, third paragraph TFEU, that is submitted to a question to the CJEU.

The purpose of the reference for a preliminary ruling is to extend within the Union an unambiguous interpretation of its rules by the related jurisprudence. An interpretation of the provision of the EU has its own concrete purpose. Your application consists of specific facts within a definition[25] and has

23CJEU, C-64/16, Associação Sindical dos Juízes Portugueses, of 27 February 2018, ECLI:EU:C:2018:117, published in the electronic reports of the cases, parr. 1, 18, 27. In this sense see also the next case: C-216/18 PPU, Minister for Justice and Equality of 25 July 2018, ECLI:EU:C:2018:586, published in the electronic reports of the cases, parr. 50ss.

24CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA of of 6 October 2021, op. cit., par. 54.

25According to the Advocate General Bobek in case C-561/19, Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA of 15 April 2021, ECLI:EU:C:2021:291, not yet published, para. 145: "(...) [the] obligation to make a preliminary ruling should arise whenever a national court of last instance is faced with a question of interpretation of EU law, formulated at a reasonable and appropriate level of abstraction. This level of abstraction is logically defined by the scope and purpose of the legal rule in question. In the particular context of the (indeterminate) legal concepts of EU law, the Court has the task of providing an interpretation of this concept. Its application, including the subsumption of specific facts in this definition, is a question of the application of EU law (…)". See also the conclusions of the Advocate General Bobek, C-923/19, Van Ameyde España of 23 Febraury 2021, ECLI:EU:C:2021:125, not yet published, par. 56: "(…) the primary role of the Court should be the articulation or refinement of legislation, the major

to do with the correctness of the final outcome of the individual case[26]. Failure to apply the claim for damages arises when the prejudicial outcome for the individual is the consequence of a failure to referral to the CJEU as it is mandatory.

In this context, the effective jurisdiction envisaged by Art. 47 of the Charter of the Fundamental Rights of the European Union (CFREU) (Peers et al., 2021) is under discussion when the law is directly applicable to the case as well as Art. 19, par. 1, paragraph 2 TEU that includes any procedural preclusions ordered by the internal justice systems, which justify the extension and review of national remedies through final decisions. It is a symmetry, we can say, of procedural remedies which is based on the principles of equivalence, on legal grounds according to the judgments of the CJEU and in the conditions in which the limits are linked in the different nature of the relative judgments[27].

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legal premise, deriving from Union law, which must be applied by national judges. The subsumption of the facts of the individual case, the minor premise, and the conclusion relating to the application of EU law in that particular case, is the task of the national courts (…)".

26According to the conclusions of the Advocate General Bobek in case: C-561/19, Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA of of 6 October 2021, op. cit., par. 149: "The purpose of the preliminary ruling obligation is to ensure the uniform interpretation of EU law, not the correct application of that law. Therefore, the uniformity sought is not and has never been at the level of the individual outcome of each specific case, but at the level of the legal rules to be applied. This logically means that while there is a reasonable degree of uniformity of legal rules, there may be diversity in terms of specific outcomes" (paragraph 149).

27According to the conclusions of the Advocate General Jääskinen in case C-69/14, Târșia of 23 April 2015, ECLI:EU:C:2015:269, par. 53 affirms that: "(...) the principle of equivalence is not respected if a subsequent judgment of the national

Relations between internal jurisdictions. The role of preliminary reference

As we have understood, the preliminary ruling procedure also has the purpose of verifying the legitimacy of internal rules which need possible remedies to challenge decisions, above all of last resort judgments and which impose a review of legitimacy proposed by the lower instance judge and which prevent the appeal for a preliminary ruling in relation to rules that are declared compliant by the supreme court of the Member State, i.e. a tool for resolving internal issues concerning relations between jurisdictions.

From the beginning, the judges of Luxembourg have asked for the overcoming of internal rules that had the purpose of preventing and facilitating the purposes and application of EU law.

The CJEU:

"(…) confirms its orientation on the obligation for the Member States to set up a system of remedies aimed at ensuring effective judicial protection to guarantee the legal positions that derive from EU law, even leading to a

Constitutional Court can lead to the review of a previous final civil judgment and, therefore, allow the recovery of unduly levied taxes, while a judgment of the Court cannot. In such a situation, rights based on the national constitution would enjoy greater protection than rights enshrined in EU law and, therefore, the latter would not enjoy equivalent protection to that enjoyed by this category of rights based on national law. A similar asymmetry occurs, according to Article 322(9) of the Romanian Code of Civil Procedure, with reference to the effects of judgments of the European Court of Human Rights compared to those of the judgments of the Court [of Justice] (...)". In the same spirit see also the conclusions of the Advocate general Bobek in case C-676/17, Călin of 11 December 2019, op. cit., par. 69.

weakening of the autonomy procedure of the states themselves (...)"[28].
Nowadays we remember the Randstad case[29], where:

"(...) the administrative judge had carried out an interpretation and an application of the national provisions incompatible with the relevant EU law in the case, as interpreted by the Court of Justice and had exercised a judicial power of which it is devoid[30] of value (…). According to the referring court, an effective remedy would be incompatible with the law (…). There is also the doubt of compatibility with EU law of the same remedy which, in line with internal practice, would not be feasible as a means of challenging the sentences (…). In deciding on disputes concerning the application of EU law itself, the CJEU unjustifiably failed to make the reference for a preliminary ruling, although there were uncertainties as to its correct interpretation (…). The CJEU found the question inadmissible since the non-referral had not been raised as a ground of appeal by the Randstad (…). For the purposes of settling the dispute, it was considered irrelevant whether, in the light of their obligations under EU law, the Member States are required to provide, in their legal systems, for the possibility of bringing an action before the supreme court if the supreme organ of administrative justice has refrained from submitting a question to the Court for a preliminary ruling (...)"[31].
In particular, the Advocate General Hogan according to the conclusions of 9 September 2021 recognized:

28CJEU, C-676/17, Călin of 11 December 2019, op. cit., par. 70: "(...) procedural autonomy is a "consequence of the asymmetry that occurs between the subjective positions guaranteed by European Union law and their projection on the level of procedural remedies", a consequence that derives from the "way of being of relations between Union law and national legal systems" (...) which are called upon to complete the existence of subjective positions deriving from Union law with an instrumental apparatus; it follows that procedural autonomy and its limits constitute the expression of a delegated competence in the context of secondary rules, which the states exercise in the interest of the Union (...)".

29CJEU, C-497/20, Randstad Italia SpA v. Umana SpA and others of 21 December 2021, ECLI:EU:C:2021:1037, not yet published. C-367/23, Artemis Security of 20 June 2023; ECLI:E:C:2023:529, published in the electronic reports of the cases. C-284/23, Haus Jacobus of 27 June 2023, ECLI:EU:C:2023:558, published in the electronic reports of the cases. C-229/23, HYA and others II of 13 June 2024, published in the electronic reports of the cases.

30CJEU, C-100/12, Fastweb of 4 July 2013, ECLI:EU:C:2013:448, published in the electronic reports of the cases. C-689/13, PFE of 5 April 2016, ECLI:EU:C:2016:199, published in the electronic reports of the cases. C-333/18, Lombardi of 5 September 2019, ECLI:EU:C:2019:675, published in the electronic reports of the cases.

31CJEU, C-497/20, Randstad of 21 December 2021, op. cit., par. 84.

"(...) that EU law does not prevent the Member States, in accordance with the principle of procedural autonomy, from limiting or subordinating to conditions the reasons that can be inferred in cassation proceedings, provided that the guarantees provided for by art. 47CFREU"[32]. (...) By not imposing this article on "a double level of judgement" (...) an extension of the scope of the internal remedy would not find justification in it (...) since this remedy is compatible with the principles of equivalence and effectiveness, the solution to an incorrect application of Union law by the judge of last instance must be found in the procedural forms of the appeal for non-fulfillment or of the action for state liability, in order to thus obtain legal protection of the rights that belong to individuals under of EU law (…). In any case, these would be "non-optimal" remedies, since the question of the substantial illegality caused by the incorrect application of EU law by the national judge has not been resolved (…)" (Picod, Van Droogbenroeck, 2020)[33].

The CJEU affirms that:

"(…) EU law does not, in principle, preclude Member States from limiting or making conditions subject to the grounds which may be invoked in cassation proceedings, provided that the principles of effectiveness are respected and are of equivalence (…). The EU judges have taken into account the procedural autonomy of the Member States aimed at fulfilling the obligation to provide the necessary remedies to guarantee the implementation of EU law pursuant to Art. 19 TEU, read in conjunction with the individual right to effective judicial protection pursuant to Art. 47 CFREU (…)"[34].

According to our opinion Art. 47 CFREU is considered in the event that the supreme court of a Member State is not competent to overturn a sentence pronounced and in violation of the law of

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32See the conclusions of the Advocate General Hogan in case: C-497/20, Randstad of 9 September 2021, ECLI:EU:C:2021:725, not yet published, par. 72, which is affirmed that: "(…) where it is also specified that if the national procedural rules guarantee that the right to be examined on the merits of a bidder's appeal by the court of first instance and, where appropriate, on appeal, the procedural rule referred to question is not such as to undermine the effectiveness of Directive 89/665 or the requirements of article 47 of the Charter (...)".

33CJEU, C-497/20, Randstad of 21 December 2021, op. cit., par. 64: "it is perfectly permissible, from the point of view of this [EU] law, for the Member State concerned to confer on the supreme administrative justice body of that state the competence to rule as a last resort, both in fact and in law, on the dispute in question and to prevent, consequently, that the latter can still be examined on its merits in the context of a cassation appeal before the supreme court of the same state (…)".

34CJEU, C-497/20, Randstad of 9 September 2021, op. cit, par. 65.

the EU by the administrative judge of last instance of a Member State of the EU.

The CJEU referred to Art. 47 CFREU as an additional parameter of the examination of the conformity of the remedy and according to EU law applicable to the case. The Member State has implemented the Union law on the subject in procurement according to Art. 47 and 51, paras. 1 CFREU (Bobek, Adams Prassl, 2020; Jarass, 2020; Tinière, Vial, 2020).

In this case, the reference to the CFREU contributes to reinforcing the obligation imposed by the relevant European legislation on the matter and provides for the relative remedies for the individuals concerned according to the respect of the conditions established by the EU law and by the applicable internal law of the EU members. The right of the CFREU persists in a right to a remedy, concretely identifying the instrument of adequate protection of the procedural configuration and the effectiveness of the substantial situation that it is actually intended to protect.

Even the European Commission can subsequently initiate an infringement procedure against the Member State for violation of EU law at the time of the decision of the dispute; of the omission of the preliminary reference; of condemnation of the state to pay damages before the judge; as well as of domestic remedies by applying to the European Court of Human Rights

(ECtHR).

In finis, the sentence of the CJEU indirectly confirms the boundaries of the jurisdictions of the national supreme judges according to the internal procedural rules since they do not conflict with the effective principles of the national supreme court and according to the principle of equivalence it will not be able to rule on a material violation of the law of the EU since an internal body is not part of the law of the EU.

Guarantee of independence and control of legitimacy. The role of the preliminary reference

When we talk about legitimacy review, we taking into consideration the IS judgment (Illegitimacy of the order for reference)[35], where the CJEU addressed a question relating to compliance with EU law:

"(...) of internal provisions which provide for the possibility for a higher-ranking judge to express a judgment of legitimacy on the decision of the lower judge to present the preliminary reference for interpretation to the Court itself. The ruling of the Court will therefore have effects not only on the assessment of the legitimacy of such a national provision, but also, indirectly, on the definition of the relationship between the domestic jurisdictions (...)"[36].

In relation to this, the CJEU stated that:

"(...) based on art. 267 TFEU, the supreme court of a Member State cannot find, following an appeal in the interests of the law, the illegality of a request for a preliminary ruling submitted to the Court by a lower court (…) the questions referred are not relevant and necessary for the purposes of

35CJEU, C-564/19, IS (Illégalité de l'ordonnance de renvoi) of 23 November 2021, ECLI:EU:C:2021:949, not yet published.

36CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 80.

resolving the main proceedings, without however jeopardizing the legal effects of the decision containing that request (...)[37] the power of the lower court to propose the referral must not be limited by an internal rule which provides for the power in the hands of the judge of higher instance to decide on the legitimacy of the decision (of the first judge) to propose such referral, since the same provision is in contrast with Art. 267 TFEU, as it hinders the preliminary ruling mechanism[38] (...) the provision "must be disapplied without the judge concerned having to request or wait for its prior removal by legislative means or by any other constitutional procedure (...)"[39]. Such limitations on the exercise of the jurisdiction of national courts would then have the effect of restricting the effective judicial protection of the rights that individuals derive from EU law (...)[40] by virtue of the principle of the primacy of EU law which the lower judge must "disapply" such a decision of the national supreme judge (...)[41], in order to be able to propose the reference for a preliminary ruling and, subsequently, correctly apply the European legislation to resolve the dispute (...). It therefore derives directly from the prevalence of Union law, which requires "all the bodies of the Member States to give full effect to the various provisions of the Union"[42], given that national law, "even of constitutional rank", cannot prejudice the unity and effectiveness of Union law[43] (...) the internal provisions relating to the division of jurisdictional powers, including those of constitutional rank, as in the present case, cannot oppose the effects of primacy (...)"[44].

In our opinion, the national standard, which was the subject of research and verification of the internal relations between the courts and in the implementation of the cooperation mechanism with the CJEU, recognized once again that the CJEU, rectius the EU law has a recognized leading role before the common judges

37CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 82.

38CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 77.

39CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 80.

40CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 76.

41CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 82.

42CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 78.

43CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 79.

44CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 79. See also the Commission decision to open infringement procedure against Poland for violations of EU law by its Constitutional Tribunal (INFR(2021)2261) and related press release of 22 December 2021 (IP_21_7070).

in the context of the referral and does not allow the existence of national rules that have a restrictive nature to refer the matter to the same court.

In fact, the internal provision has prevented an effective protection of the rights of individuals and is ensured through the postponement and the solution of the dispute that comes after the ruling of the CJEU[45].

The referring judge will be able to adopt the decision based on the interpretation that is offered by the CJEU regarding the European legislation and is applicable according to the main proceedings[46].

The internal procedural process has been declared in contrast with the law of the EU and can be recognized in a difficulty of the judges of lower rank with the aim of the inattention of the decisions of the higher level bodies due to the effect of the rulings of illegitimacy (Pech, 2021)[47]. In case of continuation of the censured behavior the CJEU puts the state in a default situation[48].

45CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 76, "as regards the preliminary ruling mechanism", "(…) the supervision of individuals interested in safeguarding their rights constitutes an effective control which is added to that which articles [258 TFEU and 259 TFEU] entrust to the diligence of the European Commission and the Member States (…)".

46CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 94.

47CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 65.

48CJEU, C-261/20, Thelen Technopark Berlin GmbH v. MN of 18 January 2022, ECLI:EU:C:2022:33, not yet published, par. 47: "(…) a violation of EU law is manifestly classified if it has continued despite the delivery of a judgment declaring the infringement, a preliminary ruling, or despite the existence of consolidated case-

Another related question arises whether the lower judge who presented the referral followed the rules of Art. 19, par. 1, sub-paragraph 2 TEU, 267 TFEU and 47 CFREU in the national legislation authorizing the launch[49].

The evaluation by the judges of Kirchberg is normal and the relative evaluation is lawful and based on Art. 267 TFEU, i.e. the only rule that is relevant for the operation of the preliminary ruling mechanism[50]. How, thus, the CFREU will be evaluated? And how should be defined the individual protection of the subjects involved?

We specify that the CJEU affirms:

"(…) the fact, for these judges, of not being exposed to disciplinary proceedings or sanctions for having exercised such a right to refer a question to the Court for a preliminary ruling, which falls within their exclusive competence, constitutes (…) an inherent guarantee of their independence (…) essential for the proper functioning of the system of judicial cooperation constituted by the preliminary ruling mechanism referred to in Article 267 TFEU (...)"[51].

For the CJEU the guarantee of independence is a fundamental element that is part of the dialogue between internal judges and the CJEU, based on the protection of the law as a judicial protection of an effective nature of the individuals involved and on the legitimacy of the related decision and in the context of the principal dispute.

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law of the Court on the matter, from which it emerges the character unlawful nature of the behavior in question (…)".

49 CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 83.

50 CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 89.

51 CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 91.

Even if the CJEU has made use of the relevant Article 267 TFEU, the fact remains that the role of common judges is defined in the context of judicial cooperation and thus the question relating to the relations between national jurisdictions and governed by the law of the Member State is resolved, respecting the right of the EU and its primacy without limitations in the exercise of competences within the framework of the mechanism envisaged by the Treaty of Lisbon, safeguarding thus the multilevel protection of its internal articulations.

It is a dialogue between the CJEU and a disciplinary procedure of the national judge according to a tactic that dates back to the history of European jurisprudence and as can also be seen in the RS sentence (Effects of decisions of a Constitutional Court) (Dumbrava, 2021; Czerniak, 2022)[52].

The referring judge essentially asked whether, the judgment of Asociaţia "Forumul Judecătorilor din România":

"(...) is compatible with EU law, in particular with Art. 19, par. 1, paragraph 2 TEU, in conjunction with articles 2 TEU and 47CFREU, a national law of a Member State by virtue of which national courts are not competent to examine the conformity with Union law of a national provision declared to be constitutional (...) and in the event that they do such examination, may be subject to disciplinary proceedings. This is a situation that once again fits into the more general theme concerning the independence of the judiciary and the need to guarantee the effectiveness of EU law, thus conditioning the justice

52CJEU, C-564/19, IS of 23 November 2021, op. cit., par. 92. C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., joined cases: C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia "Forumul Judecătorilor din România and others" of 18 May 2021, ECLI:EU:C:2021:393, not yet published, parr. 213-223.

systems of the Member States, as well as the relations between the internal jurisdictions (…)" (Liakopoulos, 2019b; Daminova, 2019; Scheppele, Vladimirovich Kochenov, Grabowska-Moroz, 2020; Spieker, 2021; Liakopoulos, 2022a; Liakopoulos, 2022b)[53].

With the sentence of 22 February 2022 the CJEU specified the non-use of Art. 47 CFREU, as not applicable by invoking a right deriving from a provision of law of the EU[54] and affirming the relevance that this provision:

"(...) must be duly taken into consideration for the purposes of interpreting art. 19, par. 1, second paragraph of the TEU (...) and therefore of the definition of the obligations that derive from it on the part of the Member States (...)"[55].

The Advocate General Collins affirms that:

53CJEU, C-619/18, Commission v. Poland of 24 June 2019, ECLI:EU:C:2019:531, published in the electronic reports of the cases. C-192/18, Commission v. Poland (Independence of ordinary Courts) of 5 November 2019, ECLI:EU:C:2019:529, published in the electronic reports of the cases. Although it was not referred to the cited jurisprudence according to my opinion the jurisprudence used by the CJEU conflicts with the effective protection of the adversarial principle and especially with the principle of the fair trial, according to Art. 6, par. 3 TEU and Art. 47 of the CFREU and the best interest of the administration of justice. Joined cases: C-585/18, C-624/18 and C-625/18 A.K. (Independence of the Disciplinary Chamber of the Supreme Court) of 19 November 2019, ECLI:EU:C:2019:982, published in the electronic reports of the cases. C-824/18, A.B and others of 2 March 2021, ECLI:EU:C:2021:153, not yet published. C-791/19 R, Commission v. Poland (Régime disciplinire des juges) of 15 July 2021, ECLI:EU:C:2021:596, not yet published. C-896/19, Republika v. II-Prim Ministru of 20 April 2021, ECLI:EU:C:2021:311, not yet published. Joined cases, C-558/18 and C-563/18, Miasto Łowicz and Prokurator Generalny, (Régime disciplinaire concernant les magistrats) of 26 March 2020, ECLI:EU:C:2020:234, published in the electronic reports of the cases. Joined cases, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Euro Box Promotion and others of 21 December 2021, ECLI:EU:C:2021:1034, not yet published. Joined cases, C-562/21 PPU and C-563/21 PPU, Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission) of 22 February 2022, ECLI:EU:C:2022:100, not yet published.

54CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., parr. 34-36.

55CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 37.

"(...) the principle of effective judicial protection of the rights pertaining to individuals under EU law is in fact referred to in Art. 19 TEU, a provision that applies in the context of an appeal concerning the contestation of the conformity with Union law of provisions of national law allegedly capable of affecting the independence of judges (...). It is sanctioned by art. 47 of the Charter as an individual right to an effective remedy before a judge (...)"[56].

In this case the CJEU affirmed that the CFREU has a supplementary value according to the interpretation of the obligation on the part of the Member States to establish necessary remedies according to the provision of art. 19, par. 1, par. 2 TEU. Thus the possibility is implied that legal situations do not directly fall within the scope of application of the law and to Art. 51 CFREU but it is the same Charter that respects, indirectly produces these effects.

The use of primary law rules is extended with the judgment through the CJEU to a broader "structure" that influences national legal systems:

"(...) regardless of the circumstance that the state activity intervenes "in implementation" of EU law (…)"[57].

The CJEU went further, reiterating that:

"(...) the obligations deriving from the Member States from Union law and, in particular, from Articles 2 and 19 TEU, although the organization of justice, including the establishment, composition and functioning of the

56CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 72-73. C-791/19 R, Commission v. Poland (Régime disciplinire des juges) of 15 July 2021, op. cit., which is affirmed that: "(…) whilst Article 47 of the Charter contributes to respect for the right to effective judicial protection of any person who avails himself, in a given case, of a right which he derives from Union law, Article 19, paragraph 1, second subparagraph, TEU aims, for its part, to ensure that the system of judicial remedies established by each Member State guarantees effective judicial protection in the sectors governed by EU law (...)".

57CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 78.

Constitutional Court, falls within the competence of the states themselves[58] (…) as a precise constitutional model which regulates the relations and interaction between various state powers, in particular as regards the definition and delimitation of the competences of the latter (...)"[59].

The Member States are thus observatory of the requirement of the principle of independence[60]. However, this "path" will not be respected if the competence of assessing the conformity of EU law with national provisions is not recognized to ordinary judges and in concrete terms since the constitutional state of a Member State has declared a domestic provision of constitutional recognizing the primacy of the law of the Union[61]. Before the principle of primacy, national norms cannot clash, rectius oppose each other: "including those of constitutional rank"[62]. This cannot depend on the interpretation of provisions of national law or on the interpretation of provisions of EU law followed by a national judge which does not correspond to that of the Court[63].

58CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 38.

59CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit, par. 43.

60CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., parr. 39-44.

61CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit, parr. 45-46.

62CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit, par. 51. C-564/19, IS of 23 November 2021, op. cit., parr. 50-52.

63CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., parr. 52-54.

The respect for primacy is based:

"(...) on the application of any provision of EU law with direct effect (...) indispensable to guarantee the full application" of EU law, as required by Art. 19, par. 1, TEU[64] and to (…) do at the same time all that is necessary to disapply a national law or practice, which possibly hinders the full effectiveness of the rules of this right having direct effect[65]. It forms an integral part of the function of EU judge performed by the national judge responsible for applying, within the scope of his competence, these rules, so that the exercise of this power constitutes an inherent guarantee of the independence of the judges pursuant to Art. 19, par. 1, second paragraph, TEU (...)"[66].

Thus, a national law or practice that prevents judges from exercising their prerogatives and in particular from referring the Court to a question of interpretation is inherent in a domestic law and is already declared constitutionally compliant undermining the effectiveness of cooperation based on the preliminary reference procedure pursuant to Art. 267 TFEU[67].

Going forward, the disciplinary responsibility that judges incur and in the event of non-compliance with the decisions of any constitutional court must be limited to exceptional cases[68] and above all when the exercise of their own competences is affected.

64CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 53-54.

65CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit, par. 63.

66CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 70.

67CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 65.

68CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 79. C-840/19, Euro Box Promotion and others of 21 December 2021, op. cit.

In fact, in practice this:

"(...) is essential, in order to preserve the independence of judges and thus avoid that the disciplinary system can be diverted from its legitimate purposes and used for political control of judicial decisions or pressure on judges. Thus, when a judicial decision contains a possible error in the interpretation and application of the rules of national and EU law, or in the assessment of the facts and the assessment of the evidence, cannot, in itself, lead to challenge a disciplinary offense to the judge concerned (...)"[69].

It is plausible that the RS judgment has drawn attention to the national legal systems and the related internal procedural rules which can be considered compatible with EU law and have as their objective the observance and the obligation to provide for the related judicial remedies which are provided for by the treaty and also in a mediated way to protect the individual's right to effective, concrete jurisdictional protection pursuant to art. 47 CFREU (Posnik, 2021)[70].

The independence of the judiciary reverberates on the fundamental principles based on the Union legal system and on the relative relationship between it and the national legal systems, as well as within them. According to the primacy of Union law, the individual states are responsible for adopting any measure necessary to guarantee respect for rights and, according to this purpose, to adapt the related procedural systems, as well as, in order to regulate the relations between the internal jurisdictions and by placing the protection of the EU law in a

69CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit, par. 84.

70CJEU, C-272/19, Land Hessen of 9 July 2020, ECLI:EU:C:2020:535, not yet published, par. 45.

pyramid.

Verification of the legitimacy of internal procedural rules and reference for a preliminary ruling

The procedural preclusions can appear as incompatible with the law of the EU by configuring obstacles capable of asserting a substantial violation of the European legislation and by calling into question the respect of the criteria of equivalence and effectiveness, of the principles based on the national judicial system as well as the protection of rights of defence, legal certainty and the conduct of proceedings.

According to Art. 47 CFREU a rule is imposed aiming at guaranteeing the appropriate procedural tools as principles deriving from the Union legal system, as a right to the application not only uniformly correct to the material law but also as an unconditional protection in favor of the substantive rights which belong to the individual. Thus, the right of the EU to the principles of effectiveness and equivalence remains faithful.

Within this introductory spirit, we recall the recent ruling in the Consorzio Italian Management case of 6 October 2021[71]. The CJEU was called upon to evaluate the compatibility of the procedural foreclosure with the law of the Union.

71CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 61.

In this regard, the CJEU affirms that:

"(...) such a rule respects the principle of equivalence, applying without distinction to claims based on the violation of EU law and of domestic law"[72], and the principle of effectiveness, being aimed at guaranteeing the smooth running of the procedure, in particular by preserving it from delays due to the assessment of new grounds[73].

In fact, it is necessary to have regard to the role of the procedural rules in the whole of the proceeding, of the development and of the peculiarities of the latter, in the various levels of judgment, that is, principles which are at the basis of the national judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the orderly conduct of the proceedings[74].

When the pleas raised before a court of last instance have to be declared inadmissible, a request for a preliminary ruling cannot be considered necessary and relevant for that court to be able to decide[75].

The preliminary question would not have been useful in resolving the main dispute. The reason relating to the violation

72CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 62.

73CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 64.

74CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 63.

75CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 65. C-3/16, Aquino of 15 March 2017, ECLI:EU:C:2017:209, published in the electronic reports of the cases, par. 45: "(…) had specified that the justification ratio of a preliminary question does not consist in the formulation of opinions of a consultative nature on general or theoretical questions, but in the need to concretely settle a dispute (…)".

of the law of the EU would not be admissible according to the internal law that prevents the proposition that modifies the object of the dispute and is not relevant in the judgment in the specific case.

The limitation to the grounds of appeal is an effect of impediment to the judge seised. In this case of the last instance which proposes the preliminary ruling from a procedural perspective relevant to the ground itself, can recall that the CJEU has followed the path of the old CILFIT ruling[76].

The line of thought has remained the same, i.e. that the judge can ascertain that the question is not relevant and that the provision of EU law in which the interpretation is subject clearly imposes itself so as not to leave room for any reasonable doubt[77].

These circumstances take into consideration:

"(...) the specific characteristics of EU law, the particular difficulties that its interpretation presents and the risk of jurisprudential differences within the EU (...)"[78].

The decision of the judge of last instance referring to his choice not to order the preliminary reference must be adequately motivated[79] given that he assumes responsibility for resolving the dispute.

76CJEU, C-283/81, CILFIT v. Ministry of Health of 6 October 1982, op. cit.

77CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., parr. 50-51.

78CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 41.

79CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 51.

The duty to state reasons is based on Art. 267 TFEU and Art. 47 CFREU, taking up the positions of the Advocate General, that:

"(…) a transversal obligation or even a fourth condition regardless of which of the three conditions will be invoked by the national judge of last instance, this judge is required to provide adequate reasons for its conclusion that the case before it does not fall within the obligation to make a preliminary ruling under the third sub-paragraph of Article 267 TFEU (...)"[80].

The reference to Art. 47CFREU based and proposed by the Advocate General and by the CJEU[81] as well as the function of the preliminary reference, are of an instrumental nature in relation to the protection of the individual's right to effective judicial protection, as an integral part of the presence of a "detailed demonstration" of the existence of the conditions for exemption. However, it does not give rise to an automatic right of reference for a preliminary ruling to the Court of Justice for the individual, who could only avail himself of the existing internal remedies, which are of a compensatory nature[82].

From the sentence just mentioned, the pre-casuistic meaning of the right in front of an effective remedy that is consecrated in

80See the conclusions of the Advocate General in case CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 167-169: "(…) a general, vague and largely unsubstantiated reference to the "acte clair" or the CILFIT judgment, without any concrete and case-specific reasoning being given as to the exact reason why there is no obligation to refer for a preliminary ruling in the merits of the case in question, does not meet this minimum requirement. The national judge of last instance must in fact take a position, through the reasoning, on the elements submitted by the parties and which emerge clearly from the procedure and from the case file. In this way, the obligation to state reasons is linked (...), of course, to the obligation of the judge to react to all the circumstances and all the pertinent arguments raised before him (…)".

81CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 51.

82CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 50.

the CFREU is noted without deriving a claim to the substantial protection of the legal position where the individual believes that the incorrect application of EU law has been violated by the judge that his decision is not available to national remedies.

The supreme judge has not been relieved of the referral obligation despite the fact that a question of interpretation of EU law remains and to which an answer must be provided in order to resolve the dispute and:

"(...) for the sole reason that it has already the Court for a preliminary ruling in the context of the same national procedure"[83].

The judge may:

"(...) refrain from referring a question for a preliminary ruling on grounds of inadmissibility inherent in the proceedings before that judge, without prejudice to compliance with the principles of equivalence and effectiveness (...)"[84].

The protection on the substantive level guarantees the indirect recourse to the CJEU given that an interpretative doubt remains as subject to the regimes of procedural and insurmountable foreclosures from the point of view of the Union legal system which is based for its implementation on the procedural systems of the Member States.

83CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 59.

84CJEU, C-561/19, Consorzio Italian Management and Catania Multiservizi of 6 October 2021, op. cit., par. 61.

(Follows): The extraordinary appeal for revocation

The reference for a preliminary ruling also has another important value from a procedural and not point of view. That of the regulative principles concerning res judicata and which guarantees the stability of law and juridical relationships as well as the good administration of justice[85].

The legal system of the EU does not impose disapplication obligations of the internal procedural rules which attribute res judicata authority while to the interested parties remain the possibility to assert the state responsibility in order to obtain legal protection of their rights of European origin[86].

The Advocate General in Călin case affirms that:

"(…) definitive sentences are not such because they are necessarily impeccable. They are definitive in that, at a certain moment, it is necessary for a case to conclude (...) the importance of legal certainty of final judgments and the legal stability is so high that it cannot be overcome by the need for effectiveness of EU law, not even if errors in the national application of EU law can thus be corrected (…)"[87].

It is understood that internal remedies allow the individual to assert his legal situation and any conditions and foreclosures that

85CJEU, C-2/08, Fallimento Olimpiclub of 3 September 2009, ECLI:EU:C:2009:506, I-07501, par. 22. C-676/17, Călin of 11 September 2019, ECLI:EU:C:2019:700, published in the electronic reports of the cases, par. 26.

86CJEU, C-34/19, Telecom Italia of 4 March 2020, ECLI:EU:C:2020:148, published in the electronic reports of the cases, parr. 58ss. C-234/17, XC and others of 24 October 2018, ECLI:EU:C:2018:853, published in the electronic reports of the cases, par. 20ss. C-49/14, Finanmadrid of 16 February 2016, ECLI:EU:C:2016:98, published in the electronic reports of the cases, parr. 48ss. C-32/12, Duarte Hueros of 3 October 2013, ECLI:EU:C:2013:637, published in the electronic reports of the cases. C-2/08, Fallimento Olimpiclub of 3 September 2009, ECLI:EU:C:2009:506, I-07501, parr. 24ss.

87See the conclusions of the Advocate General Bobek in case C-676/17, Călin of 11 December 2019, op. cit., par. 91.

are foreseen according to national procedural rules that do not violate the Union law. In itself, the law of the EU cannot impose an extension of the scope of the remedies themselves in order to guarantee the full protection of the rights of European origin and their correct application. The effectiveness of the procedural tools is an assessment with any internal foreclosures that are considered admissible, clear and predictable[88].

The absence of procedural preclusions can compromise the right to effective judicial protection and there is a risk of giving rise to a chain of references and cascades of justice. The interpretation of the CJEU in the first reference for a preliminary ruling can correctly follow the last instance in the adoption of the final decision. The doubt concerns the verification of the dispute and the correct application of the principle expressed by the European judges in the specific case[89].

The judges of Luxembourg held the scope of the internal remedies as inadmissible and the referring judge will reject the appeal by confirming the contested decision despite the fact that

88See the conclusions of the Advocate General Bobek in case C-676/17, Călin of 11 December 2019, op. cit., par. 94.

89See the conclusions of the Advocate General Bobek in case: C-923/19, Van Ameyde España of 23 Febraury 2021, op. cit., par. 56 which is affirmed that: "(…) pursuant to Article 267 TFEU, a national court can always make a request for a preliminary ruling. However, as a rule of thumb, as regards matters already interpreted, the question should correctly concern the possible refinement of the major premise based on EU law to be applied in the main proceedings (its clarification, restriction, extension, provision of an exception, and so on). However, a further confirmation of the fact that the same major premise formulated above applies to another set of facts, without in any way inviting a reconsideration of the existing major premise, is a matter of application of EU law, a task entrusted to the national courts (…)".

it is contrary to the law of the EU. The interested parties still have the possibility of carrying out the compensation actions and the existence of this violation.

The current regime does not allow and limits this means of appeal with the exception of legal ones that are compatible with the parameters of Union law. The hermeneutical and interpretative discourse remains open given that an intervention by the legislator is needed to include the hypotheses of violation of domestic law by the definitive sentences and with a way of avoiding the consolidation of incorrect applications that leave substantial violations far away and offering protection in the direct that respects remedial appeals.

The need for continuous uniform application of Union law and the security of one's own unity through the principle of equivalence and effectiveness imposes further judicial instruments fulfilling the obligation of Articles 19 TEU and 47 CFREU. It is true that national law allows and has similar remedies for breaches of domestic law. Only an extension to EU law is missing as a challenge that we'll see in the near future.

Concluding remarks

Perhaps we don't need as much, as we talked about in the previous paragraph, domestic law and its extension at the national level. We recall the ECtHR and Art. 6 ECHR concerning the state order to pay non-pecuniary damages to the applicants (Dourneau-Josette, 2020)[90]. It is duty of the national judge to exercise the assessment of the conditions for exemption from the mandatory preliminary reference with attention to the violation of the convention law.

According to the jurisprudence of the ECtHR on the subject of failure to refer for a preliminary ruling (Sudre, 2021)[91], the possible condemnation of the state, due to the fact of the judge:

"(...) in fact depends on the ascertainment of the lack or inadequacy of the motivation underlying the decision not to proceed with the compulsory indirect recourse to the CJEU (…) which individuals cannot derive from art. 6 of the ECHR. A subjective right to have the request for a preliminary ruling on interpretation accepted by the national judges (...). Object (...) is only the procedural profile and the correctness of the logical-legal process, and not the merits of the question (...)"[92].

Arguments such as the independence of the judiciary, the impartiality of judges, as well as an independent and impartial tribunal established by law, due to the illegitimate composition of the Constitutional Court of that state (Rizcallah, Davio, 2021; Ploszka, 2022; Szwed, 2022; Adamska Gallant, 2022)[93]

90ECtHR, Ullens de Schooten and Rezabek v. Belgium of 3 November 2011.

91ECtHR, Sanofi Pasteur v. France of 13 February 2020; Baydar v. Olanda of 24 April 2018; Schipani and others v. Italy of 21 July 2015; Dhahbi v. Italy of 8 April 2014; Vergauwen v. Belgium of 10 April 2012; Michaud v. France of 6 December 2012.

92ECtHR, Sanofi Pasteur v. France of 13 February 2020.

93ECtHR, Ástráðsson v. Iceland of 1st December 2020. Xero Flor w Polsce sp. Z

are debatable arguments by Strasbourg which concern all the factors that make up the systems of the Member States and to compensation for damages.

The preliminary reference for interpretation has the main value of an insurance and uniform mechanism of correct application of EU law which represents a tool for settling the related disputes between domestic jurisdictions and assessing the compatibility of national procedural rules with EU law. The different purposes of the referral do not have a significant impact on the multilevel protection of individuals in the perspective of the law of the EU as well as in the ECtHR.

The judicial road is always open for the protection of the damaged subjective juridical position and from incorrect application of the EU law reinvigorating even more the right and proper functioning of the European judicial area as well as on the procedural level the introduction of a new means of appeal such as extension of the reasons and as a basis for existing judicial appeals. There is no obligation to pay compensation but only to comply with the rulings of the ECtHR as well as of the CJEU with greater attention to the conflicting interests at stake. The reforms will be both in the near future and always both at national and European level by putting into practice the path of the principle of equivalence, the evaluation of the effects of the rulings of the European courts as a greater protection of the

o.o. v. Poland of 7 May 2021.

rights of individuals and of the basic principles founded by the EU law.

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